IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No 812 of 1996
in
SPECIAL CIVIL APPLICATION No 8482 of 1990
to
LETTERS PATENT APPEAL No 815 of 1996
with
CIVIL APPLICATION Nos 6368 of 1996
to
CIVIL APPLICATION No 6371 of 1996

For Approval and Signature:

Hon'ble MR.JUSTICE B.C.PATEL
and
Hon'ble MR.JUSTICE JAYANT PATEL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

MUNCIPAL CORPORATION OF THE CITY OF SURAT

Versus

BM TRANSPORT

Appearance:

MR PRASHANT G DESAI for Appellant
MR HARSHAD J SHAH for Respondent No. 1
MR GN SHAH for Respondent No. 2
MR PREMAL JOSHI AGP for Respondent No. 3

CORAM : MR.JUSTICE B.C.PATEL
and
MR.JUSTICE JAYANT PATEL

Date of decision: 10/01/2002

COMMON ORAL JUDGEMENT

(Per : MR.JUSTICE B.C.PATEL)

#. Appellant - Municipal Corporation of City of Surat (hereinafter to be referred to as "the Corporation") has preferred these appeals against the common judgment delivered by the learned Single Judge in Special Civil Application Nos. 8482, 6859, 6835 and 7631 of 1990 on 1.2.96.

#. The original petitioners who are respondents in these appeals except the Indian Oil Corporation (hereinafter to be referred to as "the IOC") were transporters and were engaged in transporting the products of IOC through their tankers. While transporting the products of the IOC, drivers of the tankers were required to pass through the limits of the Corporation and the Corporation was thus entitled to levy the octroi. In the case of export of the same material, the Corporation was duty bound to refund the amount. However, to make the procedure easy and to facilitate the transporters, it seems that the Commissioner of the Corporation exercised powers under the provisions contained in Bombay Provincial Municipal Corporations Act, 1949 (hereinafter to be referred to as "the BPMC Act") and under the Standing Orders framed under Section 466(1) read with Section 147 made provision for supervision charges to be collected from the transporters for carrying the goods through the limits of the Corporation under the supervision of the staff of the Corporation without paying octroi. It appears that initially, the Corporation was charging Rs. 2/= and the rate was increased thereafter to Rs. 5/=, then it was increased to Rs. 10/=, then to Rs. 20/- and then the rate was increased to Rs. 100/= with effect from 1st August, 1990. This action of the Corporation of charging these fees was the subject matter before the learned Single Judge.

#. On behalf of the respondent Corporation, it was contended that the petitioners have no locus to file petitions as the petitioners have not paid anything to the Corporation, but in fact, the amount is paid by the IOC. It was further contended on behalf of the Corporation that no evidence was produced along with the affidavit by any of the petitioners indicating that the

amount was paid by the transporters, but in fact, receipts issued by the Corporation were in favour of the IOC and therefore, according to Mr. Prashant Desai, learned counsel appearing for the Corporation, the petitioners had no right to file the petitions. Mr. Desai further submitted that at the most, the party aggrieved could be said to be the IOC. It was contended by the Corporation before the learned Single Judge that since IOC had agreed to pay fees in view of services rendered the Corporation had collected the fees.

#. It was further contended that the Corporation under the provisions of the BPMC Act read with the Rules and Standing Orders is entitled to collect the fees. Mr. Desai for this purpose, placed before us the relevant Standing Orders. He invited our attention to section 466(1)(A)(f) which reads as under.

"466(1) The Commissioner may make Standing Orders consistent with the provisions of this Act and the rules and by-laws in respect of the following matters namely:

(A)(a) xxx xxx xxx

xxx xxx xxx

(f) determining the supervision under which, the routes by which and the time within which goods intended for immediate exportation shall be conveyed out of the city and the fees payable by persons so conveying the goods;"

So far as the Standing Order is concerned, in Schedule I supervision fee is prescribed. Reading the Schedule, it clearly appears that the Corporation is entitled to recover the supervision charges as mentioned in the Schedule - I. It is required to be noted at this stage that the supervision charges have been enhanced from time to time and the Corporation is entitled to recover the amount of supervision charges as per the Standing Order. Mr. Desai invited our attention to the decision of the Apex Court in the case of the Municipal Corporation of the City of Baroda v. Babubhai Himatlal [AIR 1989 SC 2091]. After examining the provisions contained in the BPMC Act and the Standing Order, the Apex Court in para 10 held as under.

"10. It is thus clear that so far as the authority of the Commissioner under S. 466 of the Act is concerned and the manner in which the Standing Orders are framed, it is clear that the Commissioner had the authority and the Standing

Orders have been framed in accordance with procedure prescribed under S. 466 and therefore on that count the judgment of the High Court could not be sustained."

The Apex also considered the reasons for charging fees. The Apex Court also pointed in para 11 as under.

"... By this Standing Order, the Corporation has attempted to make it convenient to the transporter not to involve in the payment of octroi duty at the entry and after satisfying the authorities at the exit end claim the refund of the octroi paid, thereby the Corporation intended to help the transporter in saving time and also in payment of the octroi at one end and later on claiming a refund..."

The Apex Court also pointed in the aforesaid case as under.

" As regards this aspect of the matter, the learned Judges of the High Court came to the conclusion that there was no quid pro quo established which could justify the levy of this fees as fees for the services rendered in the interest of the transporter. In Southern Pharmaceuticals & Chemicals Trichur & Ors. etc. v. State of Kerala & Ors. etc., [1982] 1 SCR 519 this Court after considering the various decision distinguished fees from tax in these words.

"'Fees' are the amounts paid for a privilege, and are not an obligation, but the payment is voluntary. Fees are distinguished from taxes in that the chief purpose of a tax is to raise funds,for the support of the Government or for a public purpose, while a fee may be charged for the privilege or benefit conferred, or service rendered or to meet the expenses connected therewith. Thus, fees are nothing but payment for some special privilege granted or service rendered."

As regards the principle of quid pro quo rule in the same judgment, it was observed as under.

"That is because the Constitution did not contemplate it to be an essential element of a fee that it should be credited to a separate fund

and not to the consolidated fund. It is also increasingly realised that the element of quid pro quo stricto senso is not always a sine qua non of a fee. It is needless to stress that the element of quid pro quo is not necessarily absent in every tax."

Thus, considering the scheme, the Apex Court held that the Corporation is entitled to levy supervision charges by way of fees and therefore, in our opinion, the views expressed by the learned Single Judge that the Corporation is not entitled to recover the amount cannot be accepted. However, the question is whether the Corporation is entitled to collect the same at Re.1/=. Mr. Prashant Desai, learned counsel appearing for the Corporation submitted that the Standing Orders permit the Corporation to charge the fees by an agreement entered into between the IOC and the Corporation and as per the said agreement, the IOC was paying the sum of Re.1/=. It was contended by the petitioners in ground (h) in Special Civil Application No. 7631 of 1990 as under.

"(h) The petitioner further submits that as mentioned herebefore, the petitioner firm is required to pay to the Corporation every month, an amount of rs. 30,000/= to Rs. 40,000/= which the respondent Corporation has been illegally recovering as mentioned herebefore. That if this recovery continues, it may oblige the petitioner to stop his business as the incidence of the said recovery was not taken into account while making contract of transport with Indian Oil Corporation, that otherwise also the petitioner cannot be made to bear the burden of a levy which is totally illegal and unjustifiable."

In reply to this, on behalf of the respondent Corporation, it has been specifically averred in reply by deponent Babubhai K. Mehta, Octroi Inspector as under.

"15. With reference to para III(10) of the petition, I say that no amount is recovered from the Association or its members by the Corporation and the amount is recovered from Indian Oil Corporation Limited as per the agreement. It is also not correct to say that an amount aggregating to about Rs. 20,000/= to Rs. 30,000/= per day is being recovered by the respondent Corporation as alleged."

So far as the IOC is concerned, the IOC has not taken

care to produce on record the agreement entered into between the IOC and the transporter. However, it is relevant to refer to relevant part of para 18 of the affidavit on behalf of the IOC dated 30th January, 1996. The same reads as under.

> "Question of contractual obligation and its enforcement as between the IOC and the petitioner should not be gone into by the Hon'ble Court. In fact, the transaction between the petitioner and IOC are governed by an independent agreement executed by them and terms and conditions of the said agreement are binding on the parties."

It is contended further by the IOC that the relief claimed by the petitioner constitutes separate cause action against the IOC and therefore, the same should not be granted by this Court. Reading the contents of the petition, it is very clear that the petitioners were claiming the amount through IOC or from the Corporation. The petitioner has produced on record zerox copy of the receipt issued by the Corporation. Reading the same, it appears that it is issued in favour of the IOC. It is the say of the Corporation that the transporters were working as agents of the IOC and whatever amount was paid was paid by and on behalf of the IOC under the agreement and therefore, according to the Corporation, as IOC has not claimed any amount, the transporter cannot make a claim by filing writ petition against the Municipal Corporation.

#. What is required to be considered in this case is that the agreement which is produced on record indicates that the Corporation can charge Rs. 10/= per truck. The agreement dated 7th June, 1988 is produced on record at Annexure : C. This agreement was in operation upto 1989 in view of Clause 11 of the said agreement. In view of specific Clause mentioned in the agreement and condition no. 11, the agreement was binding between the parties i.e. the IOC and the Corporation for a period of one year from 7th June, 1988. Mr. Desai invited our attention to the letter dated 5th December, 1989 written by the IOC to the Corporation wherein it was agreed by the IOC that the facilities may be continued as proposed by the Corporation as per the Rules on payment of Rs. 20/= by way of supervision charges. This letter is silent about the period during which these facilities should be provided by the Corporation. There is a letter addressed by the Corporation on 13.8.90 conveying the information to the IOC that vide resolution passed by the Corporation on 4.8.98, the amount has been increased and

fixed at Rs.100/= per truck. It was further made clear that change will take place on 16th August, 1990 and thus from this date, the Corporation intended that it would collect an amount of Rs. 100/= per truck. For this purpose, we requested Mr. Desai to place before us the relevant Standing Order authorizing the Octroi Inspector to collect Rs. 100/= by way of fees. It was stated before us that the amount has been increased subsequently i.e. by resolution dated 16th December, 1994 and the amount had increased to Rs. 75/=. Mr. Desai, however, tried to suggest that there is implied consent on the part of the IOC which can be seen from the letters dated 5th September, 1992, 15th September, 1992 and 8th October, 1992. Mr. Desai submitted that it was known to the IOC that the amount of Rs. 100/= per truck is to be paid. Not only that, but even amount of deposit was also increased to Rs. 4.00 lacs which they have paid by cheque under letter dated 8.10.92. Thus, the IOC has impliedly agreed to pay Rs. 100/= per truck. Mr. Desai therefore submitted that there is no question of refund of the amount. He further submitted that as per the Standing Orders if the facilities are provided to the party, then the exchequer should not suffer and the parties must pay the amount for the facilities provided to it.

#. It is difficult for us to agree with the submission made by the learned counsel appearing for the Corporation as there is no sanction from the State Government to recover this amount at the rate of Rs. 100/= per truck. We are of the opinion that the fees can be charged in accordance with the Standing Orders and therefore, the excess amount recovered can be said to be recovered without any power. It can be said that it was recovered without legal authority.

#. It is required to be noted that the Apex Court in the case of Municipal Corporation of City of Baroda (supra) upheld the validity of the Standing Order authorizing the Corporation to charge the supervision fee which in the present case is transit fee for the benefit of the person using the services rendered by the Corporation because the sanction was granted by the State Government to the said Standing Orders. Before the learned Single Judge, it was specifically pleaded by the Corporation that the amount was recovered or levied under an agreement. It is in view of this agreement, the learned Single Judge, without going into the question of validity of the provisions of the BPMC Act and the bye-laws made thereunder, disposed of the petitions by leaving the question open. As pointed out earlier, the Apex Court

has upheld the validity of the provisions contained in the Standing Orders and therefore, the Corporation is entitled to collect the fees in accordance with the Standing Orders.

#. The Corporation has come out with a case that the amount was recovered under an agreement. We find that after 1990, the amount by way of supervision charges has been collected in excess of the limit prescribed in the Standing Orders and for subsequent period, there is no concluded agreement between the IOC and the Corporation. The agreement is for a period of one year only as indicated earlier. Thereafter, we find no reference as to on what date, it was extended. Merely because the amount towards the deposit is paid, it would not indicate that the IOC also agreed to the amount to be paid for supervision charges at the rate of Rs. 100/=. What Mr. Desai has contended is that the IOC never raised any dispute and therefore, this Court should not examine the aspect and should not decide the dispute between the Corporation and the IOC. In our opinion, IOC has not disputed the facts pleaded before the Court by the Corporation and therefore, it would not be just and proper for this Court to decide that issue. We find that the Corporation could not collect fees under the pretext of agreement unless and until such authorisation is permitted under the Standing Order duly approved and sanctioned by the Competent Authority i.e. the State Government. In the present case, IOC has not claimed for refund or preferred petition. So far as the cases of the petitioners are concerned, we are of the view that if amount is paid by individual transporter, then he may be entitled to recover the amount. Before the Court, there is no specific evidence as to what amount has been paid. Therefore, in absence of any material, the Court cannot pass order directing the Corporation to refund the amount to the petitioners. It would be appropriate for the petitioners to produce relevant evidence before the Corporation, pointing out that they have paid particular amount in excess to the Standing Orders. If the IOC has paid the amount, then there is no question for the Corporation to examine the same and if the Corporation is satisfied that the petitioners have paid the amount, then the Corporation will have to refund the amount. However, in case of dispute, it will be for the petitioners to establish their rights by filing proper suit before the court. We are of the opinion that the Corporation was entitled to collect the supervision charges to the extent permissible under the Standing Orders. It is required to be noted that we have called for original papers from the Registry of all the Special Civil Applications. There is

reference to an order dated 23.10.90. The order dated 23.10.90 passed in Special Civil Application No. 7631/90 reads as under.

"Mr. J.G. Shah, ld. Adv. for the petitioner seeks time for considering as to whether resp. no.3 Indian Oil Corporation should be transposed as petitioner No. 2 in the petition particularly when it was pointed out that transport Company would not have locus standi in the matter and if at all petitioner has any grievance against not paying up the amount by the Indian Oil Corporation, it will have remedy against Indian Oil Corporation. In case, the Indian Oil Corporation does not want to be joined as petitioner No. 2, petitioner will be at liberty to argue the matter on the point of locus standi. In that view of time is granted. S.O. to 5.11.1990."

Except in the aforesaid Special Civil Application, there is no such order dated 23.10.90 in rest of the matters.The interim order dated 1.7.91 passed in all the aforesaid Special Civil Applications reads as under.

"Rule returnable on 16.9.91. By way of interim relief, it is directed that the collection of the fees by the respondent No. 1 will be subject to the result of this petition. Mr. G.N. Desai waives service on behalf of respondent No.1."

Thus, it is clear that there was no direction to deposit the amount in separate Bank account, but only direction was that the collection of supervision charges will be subject to the result of the petition. With these observations, the appeals are required to be allowed. It is also made clear that we have not examined any aspect prior to 1990 as the same is not the subject matter with regard to collection of supervision charges. The appeals are allowed accordingly to the aforesaid extent with no order as to costs.

#. As the above appeals are allowed to the aforesaid extent, rule issued in the Civil Applications filed in the aforesaid appeals is required to be discharged.

[B.C. PATEL, J.] [JAYANT PATEL, J.]

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